SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5273

JAMES ROSS, JR.,
PETITIONER,
v.
COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION

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Prior Proceedings

Petitioner was convicted of armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. The convictions were unani-

mously affirmed by the Massachusetts Supreme Court. *Commonwealth* v. *Ross*, 1972 Mass. Adv. Sh. 873, 282 N.E.2d 70 (1970).

Petitioner Ross applied for a writ of certiorari to this Court on the issue of proper scope of voir dire examination. On January 22, 1973, this Court granted certiorari, vacated the judgment, and remanded to the Massachusetts Supreme Court for further consideration (*Ross* v. *Massachusetts*, — U.S. —, 12 Cr. L. 4143 (January 22, 1973) in light of this Court's decision in *Ham* v. *South Carolina*, 409 U.S. 524 (1972)).

On remand, the Massachusetts Supreme Court unanimously affirmed the petitioner's conviction. *Commonwealth* v. *Ross*, 73 Mass. Adv. Sh. 839 (1973).

Statement of the Issue

The sole issue before this Court is whether the decision in *Ham* v. *South Carolina* requires that this Court reverse the judgment of the Massachusetts Supreme Court and order a new trial for the petitioner Ross.

Argument

I. The Trial Judge Properly Exercised His Discretion In Limiting The Scope Of Voir Dire On The Issue Of Racial Prejudice.

A. *Trial Court Judges Have Broad Discretion In Conducting Jury Voir Dire.*

This Court has consistently adhered to the principle that the findings of a trial court upon the issue of voir dire ought not to be set aside by a reviewing court, unless the error is manifest. *Reynolds* v. *United States*, 98 U.S. 145

(1878) [quoted with approval in *Irvin* v. *Dowd*, 366 U.S. 717 (1960)]. See also *Aldridge* v. *United States*, 283 U.S. 308 (1931) (dictum). Illustrative of this proposition is this language from a recent Ninth Circuit case decided in accordance with this principle:

> When a juror's impartiality is put in issue, the nature and extent of permissible inquiry of that juror to ascertain if he has any opinions about the case and, if so, whether such opinions would influence him and prevent him from finding his verdict solely in accordance with the evidence presented in court, is a matter within the discretion of the trial judge and raises no constitutional issue unless the procedures followed are as a whole unreasonable and devoid of purpose to obtain an impartial tribunal. *Hilliard* v. *Arizona*, 362 F.2d 908, 910 (9th Cir. 1966).

The broad discretion thus given to the trial judge is limited by the Due Process Clause of the Fourteenth Amendment in that the selection process must comply with "essential demands of fairness." *Ham* v. *South Carolina*, 409 U.S. 524 (1972); *Lisenba* v. *California*, 314 U.S. 219 (1941). It is clear from the opinion in *Ham* that whether or not the scope of voir dire complies with "essential fairness" depends on the facts of each case.

> We think the Fourteenth Amendment required the judge *in this case* to interrogate the jurors upon the subject of racial prejudice. . . . The state having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that *under the facts shown by this record* the petitioner be permitted to have the jurors interrogated on the

issue of racial bias. (Emphasis added.) *Supra* at 527.

Thus, *Ham* did not create a broad new constitutional requirement that questions designed to discover possible racial prejudice be put to prospective jurors in all state criminal trials where the defendant is black. (See reasoning of Supreme Judicial Court upon rehearing.) Rather, this Court raised to a constitutional level error resulting from failure to meet the "essential fairness" test of *Aldridge.*

B. *The Finding Of Error In Ham Was Dictated By Facts Different From Those In The Instant Case.*

In *Ham* the facts compelled the Court's decision that the trial judge did not meet the "essential demands of fairness" required by the Fourteenth Amendment. Ham was a "black, bearded, civil or human rights activist" who had gained notoriety as such in Florence County. *Ham* v. *South Carolina, supra,* Appendix to Petitioner's Brief (hereinafter "A".) at 71, 73-74. The success of the prosecution against him for the possession of marijuana depended *solely* upon the jury's acceptance of the testimony of a white police officer. The officer claimed that he had found the drug on Ham's person while searching him, whereas Ham testified that he did not have the marijuana in his possession. Adding to the importance of the credibility issue was Ham's allegation that the police had been "out to get him" because of his civil rights work.

Moreover, the case was of unusual interest because of the recent publicity and concern in Florence over a serious drug problem. A. 36. The police officer who was the State's chief witness had recently appeared on a local television program to discuss violations of the drug abuse law. A. 36.

The trial court, faced with these facts and with defense counsel's timely motion for extended voir dire on the issue of racial prejudice, dismissed summarily defense counsel's motions, claiming they were "not relevant" (A. 35); used the general statutory questions concerning bias and prejudice without any expanded explanation as to their meaning; and, failed to instruct the veniremen as to the essential facts of the case before stating the general questions on bias. This omission severely reduced the likelihood that the general questions would be effective in directing attention to the racial bias of a potential juror.

In the case at bar, however, there were no facts mandating an extension of voir dire beyond those required by Massachusetts law. Although the petitioner is black, there was nothing peculiar to the circumstances of the case to make Ross a special target for racial prejudice. *Ross* v. *Commonwealth, supra.* In fact, in response to a question by the trial court, defense counsel himself recognized that the only reason he moved for extended voir dire was "just the fact that the victim is white and the defendants are black." Transcript (hereinafter "Tr.") 400.

There was no claim on the part of Ross that he was being prosecuted on manufactured evidence, or that he was a public figure in the community. Moreover, credibility was not an explicit issue, as it was in *Ham,* because Ross never took the stand in his own defense. Neither his nor any black witness' credibility was before the jury. The only issue in the trial was whether he participated in the robbery and assault. Under the facts of this case the trial court judge was not constitutionally required to allow questions of prospective jurors concerning their possible racial prejudice beyond the comments and questions that were put to them.

The trial judge used great care throughout the course of the jury empanelment to ensure selection of an impartial

jury. Where he thought the furtherance of that goal required, he even exceeded Massachusetts' statutory requirements regarding selection. M.G.L. ch. 234, §28. Initially the judge saw two potential areas of jury prejudice: (1) possible lack of impartiality because the victim was a security guard or "quasi-policeman"; and (2) possible race prejudice because the defendants were black.

As to the first area the judge agreed to ask the veniremen the extra statutory question of whether they had done police work or whether they had any relatives in such work.[1] Such a question had the effect of enhancing defendants' use of their peremptory challenges. The courts, in deciding whether the essential demands of fairness have been met, generally look to see if such effective use of peremptory challenges has been permitted. *United States* v. *Dillinger*, 472 F.2d 340 (7th Cir. 1972); *Swain* v. *Alabama*, 380 U.S. 202 (1965); *Bailey* v. *United States*, 53 F.2d 982 (5th Cir. 1951).

As to the possible racial prejudice, the trial court recognized the relevance and importance of the issue[2] but considered the questions proposed by defense counsel ineffective.[3] The judge noted that in his experience "the

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[1] Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's Office, or do you have any relative or relatives who is or was engaged in such work?" Tr. 435. Seven veniremen were excused on this basis.

[2] Indicative of the trial judge's sensitivity to the issue of race is the fact that he decided not to mention defendants' Muslim names, which appeared on the indictments, but referred to them only as Ross, Daniels and Williams.

[3] Response to the motion for extended voir dire on the issue of racial prejudice: "All right. I am going to approach it, as I have said with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into the details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance. All we can hope and pray for is that the jurors take their oaths seriously and understand the spirit of what the court

man who had the disease of bias would be the last one to admit it." Tr. 422. To deal with this issue he first asked the defendants to stand up, allowing the veniremen to see them and to note that they were black. Next, he instructed each group of veniremen concerning general bias or prejudice against the defendant, though he did not specifically mention racial bias.[4] In this extrastatutory instruction the judge appealed to the "intellect and conscience" of the veniremen to "render a fair and impartial verdict upon the evidence and no other considerations." Tr. 433-434. In addition, he repeatedly adjured them to make sure that they were free from "any bias or prejudice" which would impair their deliberation.[5] Finally, pursuant to the Massachusetts statute, he questioned each group of veniremen

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says to them — this Judge anyway — and I am sure all judges of this court — would take the time to impress upon them before, during, and after the trial, and before the verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.

I believe that this is the best that can be done with respect to the problems which — as I said, I regard as extremely important." Tr. 420.

[4] In colloquy with counsel, the judge indicated that in his preliminary instructions he would speak "with particular reference to the statutory question which will be No. 1 [regarding prejudice or bias]." Tr. 426.

He went on to state in his instructions: "Under your oath, which you took as you began your month of service and which you take before you commence your service on this case, if you are selected, you are required to render a fair and impartial verdict upon the evidence which is presented before you, and free of any bias or perjudice or other extraneous influence.

Now, as always occurs before you are finally seated on this case, if you are, the Clerk, Mr. Voke, will ask you a question which is designed to give you an opportunity to inform the Judge prior to your being accepted as a juror, if you believe that you cannot render a fair and impartial verdict on the evidence, or if you have doubt as to whether you can render a fair and impartial verdict upon the evidence." Tr. 431.

[5] If you have any interest in this case or have expressed or formed an opinion, or are sensible of any bias or prejudice . . . please make it known to the Court." Tr. 432.

concerning general bias or prejudice against the defendant.

It is submitted that the veniremen clearly understood that prejudice regarding which they were questioned included racial prejudice. In answer to the questions, several prospective jurors raised their hands to indicate possible bias. Those who indicated that they might be biased or prejudiced, or had already formed an opinion of the defendants' guilt, were then questioned individually by the judge. One prospective juror was excused because of admitted racial prejudice and two were excused for an unspecified prejudice.

Given the broad discretion allowed trial judges on the scope of voir dire examination, it was eminently reasonable and fair for the trial judge in the instant case to try to elicit racial prejudice in the manner just described. The voir dire examination does not have to be the most searching possible, but merely sufficient to test the qualifications and competency of the prospective jurors to try the case. *Kreuter* v. *United States,* 376 F.2d 654 (10th Cir. 1967).

II. Principles of Comity Dictate That Massachusetts Be Allowed To Administer Its Own Policy of Voir Dire, Absent Clear Constitutional Error.

Massachusetts has determined that justice and procedural efficiency require a narrow statutory voir dire except where the trial judge determines that unusual circumstances require otherwise.[6] Whenever an abuse of discre-

[6] The Massachusetts Legislature has frequently considered altering M.G.L. ch. 234, § 28 (once in 1955 and three times in 1970). Each time, the proposed alteration has been defeated. Indicative of the reasons for the bill's defeat is this quote from the Judicial Council of Massachusetts to the General Court concerning the proposed bill, H. 1115, which would have extended voir dire: "We think H. 1115 is not in the public interest and that it would delay, prolong, and complicate trials and add to congestion of the criminal and civil side of the court." 31st Report of the Mass. Jud. Council (1955), pp. 35-36.

tion may occur in Massachusetts' trial courts, the Commonwealth's Appellate Courts have ample learning to discern it and ample power to remedy it, along the guidelines laid down by this Court.

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conceptions of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental: *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934).

No such abuse of fundamental principle has been shown here. The conviction was affirmed once by Massachusetts' Supreme Judicial Court. When it first came before this Court, it was sent back to the Supreme Judicial Court to ensure that consideration be given to the principles set forth in *Ham*. After a second consideration specifically in light of those principles, the Supreme Judicial Court reaffirmed the conviction. Certainly this petitioner has had a full consideration, and he has made no showing that it was not a fair one. In the absence of such a showing, it is respectfully submitted that comity dictates that this Court should refrain from further review of this case.

Conclusion

In conclusion, therefore, it is respondent's position that there was no constitutional error in the trial judge's exercise of discretion in limiting voir dire, and that in the absence of a clear showing of such error by the petitioner, the decision of the Massachusetts Supreme Judicial Court should be accorded the deference dictated by principles of comity.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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